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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5175

RANDALL DALE ADAMS,

Petitioner,

—v.—

STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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Statement of Interest of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.

(1) The Legal Defense Fund is a non-profit corporation established to assist black citizens in securing their constitutional rights. In 1967, it undertook to represent all condemned prisoners

in the United States, regardless of race, for whom adequate representation could not otherwise be found. It has frequently represented condemned inmates before this Court. E.g., Maxwell v. Bishop, 398 U.S. 262 (1970); Furman v. Georgia, 408 U.S. 238 (1972); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976); Davis v. Georgia, 429 U.S. 122 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Coker v. Georgia, 433 U.S. 584 (1977); and Lockett v. Ohio, 438 U.S. 586 (1978). The Fund has also appeared before this Court as amicus curiae in many other capital cases. E.g., Witherspoon v. Illinois, 391 U.S. 510 (1968); Gregg v. Georgia, 428 U.S. 153 (1976); and Proffitt v. Florida, 428 U.S. 242 (1976).

(2) The Legal Defense Fund continues to provide legal assistance to indigent condemned prisoners of all races, and is now involved as counsel in over one hundred death cases in various states. It represents a substantial number of indigent death-sentenced inmates in Texas who are at various stages of post-conviction proceedings. Additionally, the Fund provides consultative

assistance to attorneys representing a large number of other capital defendants in Texas and elsewhere.

(3) The issues presented by this case are of general applicability to a number of death-sentenced inmates in Texas, including several represented by the Legal Defense Fund. The identical issues have been decided in favor of another Texas capital defendant by a panel of the United States Court of Appeals for the Fifth Circuit, in a case in which the Fund appeared and co-argued as amicus curiae. Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), rehearing en banc granted, 598 F.2d 1016 (5th Cir. 1979) (argued January 8, 1980). Because of the Fund's experience with these particular constitutional questions, we respectfully request the opportunity to present our views in the hope that they may be of assistance to the Court.

(4) Consent has been granted by both petitioner and respondent for the filing of this amicus curiae brief.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 577 S.W.2d 717 (Tex. Crim. App. 1979).

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Petitioner's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on January 31, 1979, and rehearing was denied on March 21, 1979. A timely petition for writ of certiorari was filed, and on December 10, 1979, this Court granted certiorari. ___ U.S. ___, 48 U.S.L.W. 3387.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the following statutes of the State of Texas:

Tex. Penal Code §12.31. Capital Felony.

(a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Tex. Code Crim. Pro. Art. 37.071. Procedure in capital case.

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court

of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

QUESTIONS PRESENTED

(1) Whether the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968), is applicable to the bifurcated procedure employed by Texas in capital cases.

(2) If so, whether the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code §12.31(b) violated the doctrine of Witherspoon v. Illinois, supra.

STATEMENT OF THE CASE

On May 3, 1977, petitioner was convicted of capital murder and sentenced to die by a jury in Criminal District Court No. 2 of Dallas County, Texas. The Texas Court of Criminal Appeals affirmed the conviction and death sentence on January 31, 1979 (577 S.W.2d 717), and rehearing was denied on March 21, 1979. On December 10, 1979, this Court granted certiorari, ___ U.S. ___, 48 U.S.L.W. 3387.

This case concerns the constitutionality of the exclusion for cause of prospective jurors at petitioner's trial. A description of the voir dire examination of several of these prospective jurors is set forth below.

MRS. FRANCIS MAHON

Mrs. Mahon believed in capital punishment:

> ... there's always been a need for the death penalty in certain types of cases.
>
> Q. [By the prosecutor]: Have you always been in favor of it?
>
> A. Yes.

T. 34.[1/] She further repeatedly vowed that she was in favor of the death penalty in a proper case, including this type of case (as it was described to her by the prosecutor), T. 33, 34, 35, 36, 37, 49, and would answer "yes" to the three special questions determinative of sentence if the State proved beyond a reasonable doubt that the answers to those questions were indeed "yes," T. 60-64. However, when asked whether she could swear that the mandatory sentence of death or life imprisonment would not affect her deliberations [Tex. Penal Code §12.31(b)], she responded:

1/ Numbers preceded by "T." refer to pages of the transcript of the jury selection in this case.

> ... I just don't know. I really do not know whether it would effect me or not when it came right down to it....
>
> -- it could effect me and I really cannot say no, it will not effect me, I'm sorry. I cannot, no.

T. 67-68.

> ... If there was any doubt in my mind about one of those three questions that were asked, then I might have a tendency to say no to one of them if there was a doubt in my mind there. You see what I'm saying?
>
> THE COURT: What you're saying, you cannot give us your assurance that you would not be influenced by the punishment in answering the questions on fact issues.
>
> JUROR MAHON: Well, I'm saying I could be influenced and I think most anyone could be.

T. 70. The court excused Mrs. Mahon for cause.

T. 71.

MR. FORREST JENSON

Mr. Jenson stated his views on capital punishment as follows:

> Well, I think I believe in letting the punishment fit the crime. I've never had to decide whether or not somebody lived or died and I don't know if I could or not. I feel like I could if I had to....

> ... I wouldn't say I'm really for the death penalty, but I do feel that society has to have some deterrent to crime and as a result, probably capital punishment is the only means of deterrent that we have.

T. 351. Mr. Jenson further affirmed that he was capable of personally voting for the death penalty as a juror, T. 354, and of answering "yes" to the three Texas special questions if the evidence called for those answers, T. 361-64.

However, when asked whether he could take the §12.31(b) oath, Mr. Jenson stated:

> Well, I think it probably would [affect my deliberations] because afterall, you're talking about a man's life here. You definitely don't want to take it lightly.... [W]hen you have got the death penalty to deal with, I think you have got to be pretty certain.

T. 367.

> Well, I'm just human like everybody else ... I think it probably will effect anybody's ...
>
> I don't know of anybody it couldn't [affect]...
>
> ... I don't believe anybody could [not be affected] because you might as well get a computer to sit on the jury.

T. 368-70. Mr. Jenson was excused for cause. T. 371.[2/]

MRS. NELDA COYLE

Mrs. Coyle favored the death penalty in some circumstances, and would vote for the death penalty in the present type of case if the facts and circumstances called for it. T. 1023-26.

When asked whether the death penalty would "affect" her deliberations [Tex. Penal Code §12.31(b)], Mrs. Coyle at first stated that it would, T. 1030, 1035, and then said that she wasn't sure whether or not it would affect her because she had never before been a juror in a death case, T. 1038, 1048-54. She agreed that she could not assure the Court that she would not be affected. T. 1054-55. Upon questioning by defense counsel, she said that she could decide the issues of fact in the case without worrying about the death penalty or life imprisonment. T. 1059. Upon further questioning by the prosecutor,

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2/ Respondent's Brief in Opposition to Certiorari (p. 6) notes that Mr. Jenson used the phrase "beyond all reasonable doubt" in some of his answers. See T. 351, 354, 368. However, the prosecutor did not press Mr. Jenson as to his meaning in using this phrase and the trial judge did not rely upon it in excusing him for cause.

she said that "[y]'all have got me confused," T. 1060,[3/] and ultimately reverted to her earlier position that she could not say whether or not she would be affected, T. 1064-65, 1067. "I cannot tell you this because I don't know." T. 1067. She was excused for cause, the trial judge commenting that "[w]e are simply in a situation where you are not able to give the assurance that the law requires in order to serve on the jury." T. 1070.

MRS. LLOYD WHITE

Mrs. White first stated that she did not believe in capital punishment, T. 1528, and then said that "I think I believe in capital punishment but I don't want to have anything to do with it, is that clear?" T. 1530. At one point she agreed that she "could never sit in a case which would call upon [her] to make decisions that could lead to a man's death," T. 1531, and that she did

---

3/ Mrs. Coyle stated at this point that she did not want to be a juror. T. 1060. When pressed by the prosecutor as to whether her reluctance to serve was based upon her feelings about the death penalty, she responded: "Well, part of it but there is a lot of other reasons." T. 1061.

not think she would ever be able to vote "yes" to the three sentencing questions, T. 1544. She also stated that the prospect of the death penalty would affect her sentencing deliberations. T. 1535, 1545.

Upon questioning by defense counsel, however, Mrs. White stated three times that she could set aside her feelings and vote for the death penalty. T. 1547. She was then asked:

> ... you have to vote the question -- the answers to the questions honestly irregardless of what you think the penalty should be, do you think you can do that?
>
> A. Yes.
>
> Q. If the facts and circumstances justified it?
>
> A. Yes.
>
> Q. A yes or no answer -- you would answer yes or no irrespective of how you would -- you would set aside your feelings about how you thought the punishment should come out?
>
> A. I think so.

T. 1548. Defense counsel then began discussing the elements of the offense, T. 1549-50, but was admonished by the trial judge:

> Well, she's been submitted under 1231. Stay with 1231 if you would.

T. 1551. Defense counsel objected that Mrs. White's answers had established that she was qualified to serve. Ibid.

Upon further questioning by the prosecutor, Mrs. White stated that "I don't believe I can serve on this jury" because "this is all just going over me." T. 1555. The trial judge then attempted to clarify her views, and the following colloquy ensued.

> [THE COURT] ... You have to be able to objectively answer those questions based on the evidence that you hear during the trial without any regard whatsoever to what punishment would follow.
>
> Do you follow me?
>
> JUROR WHITE: Yes.
>
> MS. JAMES [Defense Counsel]: Your Honor, I again object to this question, it's been asked and answered on the first go-around. I think they finally did answer the first time they went around. She did not think her fact deliberations would be unequivocally [affected] --
>
> JUROR WHITE: Well, I don't think -- I think that was wrong.
>
> THE COURT: Your objection is overruled.
>
> JUROR WHITE: I think I answered wrong. I think I have got to go back the other way now.

> THE COURT: Well, that is what we are trying to find out.
>
> JUROR WHITE: Now, am I making myself clear now?
>
> THE COURT: Well, the reason I go into it is because I think that you originally answered it one way and then answered it a different way, is that right?
>
> JUROR WHITE: I think that is what I did, yes.

T. 1558-59.

Upon further questioning, Mrs. White stated twice more that she could not give her assurance that her deliberations would not be affected. T. 1561, 1563.

> Q. [By defense counsel]: I'm sorry we have to go over it again but I understood you to say when we asked you at the beginning could you lay your opinion and your feelings aside and answer the questions honestly, I think you said yes?
>
> A. I did but I cannot say yes to that now. That is not -- I couldn't lay my feelings aside.

T. 1563. Mrs. White was excused for cause. T. 1566.

MR. CURTIS WILLIAMS

Mr. Williams did not know how he felt about the death penalty. T. 2576. At first he stated that he did not know whether he could vote to impose death, because he wasn't sure of his feelings. T. 2577-79. He stated:

I don't know. I don't -- I guess I could.

THE COURT: You're not sure?

THE WITNESS: Right.

T. 2580.

I'm not saying I would never, never do it. I'm not sure right now. I don't know.

Q. [By the prosecutor]: You're not sure whether you could ever, ever do it?

A. I don't know.

T. 2582.

Upon further questioning by the prosecutor, Mr. Williams at times stated "I just couldn't," T. 2586, and "I can't do it," T. 2592; at other times he stated that "I don't think I could," T. 2587, 2592, 2595; and at other times he repeated that he just didn't know, T. 2586, 2588, 2589, 2590.

However, after the trial judge explained to him the Texas procedure for determining sentence in a capital case, Mr. Williams stated: "I could answer the questions." T. 2597. The following colloquy then ensued:

THE COURT: All right, sir. Would you and could you answer all three of those questions yes if the evidence says, to your way of thinking, that the questions ought to be answered yes?

THE WITNESS: That's right.

THE COURT: Even though you realize if you did answer yes that the death penalty is going to come out of that, could you still answer those questions yes? That's what I'm getting at. If you can, you can; if you cannot, you cannot. We just need to know how you feel.

THE WITNESS: I guess I could answer all three questions yes.

THE COURT: Say you're back in the jury room and found him guilty in capital murder, you're voting on these questions with the other Jurors; and let's say under the evidence you heard that the right answer to all three of those questions is yes, okay?

THE WITNESS: Right.

THE COURT: You know that if you vote yes on all three questions that his punishment is going to be death; and my question is, under those circumstances would you go ahead and vote yes or would you be influenced by the death penalty part to keep you from voting yes?

THE WITNESS: I think I would be influenced by the death penalty.

THE COURT: Do you think the punishment of death would affect your deliberations?

THE WITNESS: Yes.

THE COURT: (To Mr. Scott [the prosecutor]) Do you submit [i.e., challenge for cause]?

MR. SCOTT: I submit.

T. 2597-98.

After inquiry by defense counsel, the Court ascertained Mr. Williams' position once again:

> He says (to the witness) -- and you can correct me if I am wrong -- Mr. Williams stated that even though the questions should be answered yes, that the punishment of death, that would affect his ability to answer the questions yes and would affect his deliberations on fact issues.
>
> (To the witness): Is that a fair statement?
>
> THE WITNESS: Yes.

T. 2598-99.

Defense counsel then further questioned Mr. Williams:

> Would there be an automatic "no" response or would you be able to answer "yes"?
>
> A. (By the Witness) Yes, I think I could answer all the questions yes.
>
> Q. You said yes, you thought you could answer them? You would not have an automatic no response?
>
> A. I'm not going to say I'm going to have an automatic response.

T. 2601-02. Defense counsel then objected to Mr. Williams' exclusion, and the Court asked the prosecutor:

> Are the grounds for submission that he doesn't comply with 1231?
>
> MR. SCOTT: That's correct.

T. 2602. The Court once again asked Mr. Williams the question posed by Tex. Penal Code §12.31(b):

> Let me ask you again, in your deliberations on the issues of fact, in other words, those three questions we've talked about, would you be affected in your deliberations by the punishment of death or life imprisonment?
>
> THE WITNESS: That's right.

T. 2602-03.

Mr. Williams was excused for cause. T. 2604.

MRS. BOBBIE ANDREWS

Mrs. Andrews felt that she believed in the death penalty, T. 2697, but nonetheless stated at first that she personally was incapable of imposing it, T. 2697-98. However, she subsequently stated that

> ... if I were in the situation I would consider the facts as presented, and I agree that there are some acts that deserve the death penalty. If a person takes another person's life, I don't think he or she should be given an opportunity to do it again.

T. 2699. When reminded that she had said that she personally could not vote for the death penalty, she replied:

> That's what I said, and I think that's how I feel. I've never served on a Jury before, been a part of a group that says this. It would be a little bit different rather than being an individual.

T. 2700.

The trial judge then turned to the question posed by the §12.31(b) oath, asking Mrs. Andrews whether she could give her "unequivocal assurance" that the punishment of life or death would not affect her deliberations. She replied that "I don't believe I could give you my unequivocal assurance." T. 2704. When asked again whether the potential penalty would affect her deliberations, she paused and then stated: "I have to say it would." T. 2705-06.

Upon subsequent questioning by defense counsel, Mrs. Andrews stated that she "certainly could consider" the death penalty although she felt that "my feelings might enter into it. I do not believe in taking someone else's life." T. 2708. When asked whether she could set her feelings aside and allow the State's right to impose the death penalty to prevail, she at first answered "I will have to say no to that" but then said "I don't know." T. 2709-10. She further stated that

> ... I believe a person who has done any one of these things should be punished. And I have no disagreement with the State's punishment for this.

> All I said was I personally would rather not be a part of saying, this person's life should be taken.

T. 2713. And when asked again whether she could set aside her feelings and vote for the death penalty, she answered:

> Well, I'm not sure that's a question I could answer today. I mean, I think I would have to be in that situation and I would have to hear all the facts and then I would know what I would do.

T. 2715.

When defense counsel argued that Mrs. Andrews had in effect answered "I don't know" on the subject of whether she could set aside her personal feelings and follow the Legislature's range of punishment, T. 2718, the trial judge interrupted and stated:

> That's not the point ...
>
> ... she has never stated that she would not be affected in factual deliberations because of the mandatory punishment of life or death. That's the issue we're on ...
>
> She's been submitted on Article 1231. That's the issue at hand.

T. 2718.

Defense counsel nonetheless returned to the earlier line of questioning, and again asked Mrs. Andrews if she would automatically vote against the death penalty. She replied:

> I just said that I was afraid I could not lay aside my feelings. I don't know that I would automatically vote against it.

T. 2719. Although she was not sure that her feelings "would not affect" her decisions, T. 2720, 2721, she stated that she "would answer the questions honestly," T. 2723, and that "[t]here might be a case where I could vote yes" on the three questions determinative of sentence, T. 2725.

The trial judge asked Mrs. Andrews whether she could assure him that she would not be affected in her deliberations, and she replied: "That's what I said I could not assure you of." T. 2726. She then had the following exchange with the judge:

> ... I would not want to be dishonest in the way I answered the questions. But my personal feeling is I don't want to be a part of taking someone's life.
>
> Now, is that -- you know, are those two answers not compatible?
>
> THE COURT: I don't want to comment on that, because in the end I have to come back to the statutory question. We can not impanel, under the law, anyone -- anybody on this Jury unless and until that Juror can swear under oath that the mandatory punishment of death or life imprisonment will not affect their deliberations on any fact issue in this case.

> THE WITNESS: Okay. I cannot do that.
>
> THE COURT: You cannot swear to that?
>
> THE WITNESS: Right.

T. 2726-27. She was excused for cause. T. 2730.

MS. PENNY L. McDONALD

Ms. McDonald was against capital punishment. T. 4496. At first she said that she could not vote for the death penalty in this type of case, T. 4497, but upon further questioning by the prosecutor said that she could do so, T. 4497-98, and that "I think I would have to know more of the circumstances [of the case]," T. 4499. She ultimately stated:

> ... I can't say I'm flat against capital punishment until I have heard the facts of the case.
>
> THE COURT: I'm sorry. When you say you're against capital punishment, are you saying that you're against it period, or are you against it in most cases or I don't quite understand what you're saying.
>
> MS. McDONALD: I'm against it as far as ever being personally concerned with it. Reading the paper or reading anything -- I'm against it as far as that goes.
>
> THE COURT: Well, are you saying that even though you're against it, since it is a law, that you could serve on a jury and vote for it if the facts were proper?
>
> MS. McDONALD: Yes, I could.

Q. (By Mr. Scott [the prosecutor]) I understand your position now. It's a matter of the facts and circumstances and if the proper facts came along to your way of thinking, you could vote for death?

A. Yes, I could.

T. 4506.

The prosecutor's questioning later turned to the §12.31(b) oath:

Q. (By Mr. Scott) Would your feelings affect the way that you deliberated the issues of fact in the case?

A. Yes, I think anyone's feelings would.

Q. I'm not arguing with that. Would the mandatory sentence of death or life affect your deliberation on the issue of guilt or innocence?

A. Not the guilt or innocence. If the man is guilty, he's guilty, and the next step is the next step.

Q. You say it would on the three questions?

A. Might. I don't know. Like I said before, I would have to hear all of the circumstances and all of the facts. I think anyone who sat back there, even [if] they told you emphatically -- would inject their own feelings.

T. 4529-30.

Subsequently, Ms. McDonald said at one point that she would not be affected in her sentencing deliberations. T. 4536. And upon further questioning by the prosecutor, she stated:

I wouldn't answer the three questions yes unless I felt he deserved death from the facts, and I can't consider the facts until I have heard them, and then I might change my mind. I can't say what I would do until I know the facts.

Q. Would you, if you thought the facts meant the questions should be answered yes, and yet your feelings told you he should not get death, would you[r] conscience require you to misanswer one of the questions?

A. No.

Q. So you would set aside your conscience?

A. Yes, I would.

THE COURT: Let me ask one question. If you find him guilty of capital murder, and you are convinced under all of the evidence that the truthful and proper answer to those three questions is yes -- let's say that there is no question in your mind about it, that the proper answer to the questions is yes, and we know that answering yes means that he will die in the electric chair. Let's assume that. Let's say on the other hand, that you have a personal feeling that regardless of all of this that he just for one reason or another should not die because of this crime.

Now, would you go ahead and answer those questions yes where the evidence to your way of thinking called for the answer yes under those circumstances, or on the other hand, would your feeling that he just shouldn't have death, prevent you from answering a question yes?

MS. McDONALD: I would answer the question yes if circumstances indicated they would be answered yes.

THE COURT: Even though you yourself felt he shouldn't have the death penalty?

MS. McDONALD: Yes, I would, even though I don't believe in it. I'm against capital punishment, but if it was proved to me that it was necessary. If I could answer the questions yes, I would answer them yes.

T. 4542-44.

Q. [By the prosecutor]:... Are you saying that you don't disagree with the legislature and that you are prepared to set aside your personal feelings?

A. Yes, I am. If I was on a jury, I don't know how I could do anything else.

T. 4545.

Q. [By the prosecutor]:... could you set aside your feelings?

A. I could.

Ibid.

The prosecutor then came back to the §12.31 (b) oath, and asked Ms. McDonald whether she could give her assurance that she would not be affected in her deliberations by the prospect of the death penalty. She responded that she didn't know, that she had reservations about her ability to take

such an oath, and that she did not want to take the oath. T. 4550-51.

Upon questioning by defense counsel, Ms. McDonald repeated that she could vote for the death penalty, T. 4553, but that she could not take the oath, T. 4554-57. She stated:

... I can't take that oath and be honest about it. I can take an oath and do what I want to do. I can't take an oath and tell y'all that I'm going to knock out the whole fact that the death penalty is involved in it, because I don't know when I get there. I don't know about the facts or anything. The facts may prove that I could do it, and I would do it and vote for the death penalty.

Q. [By defense counsel] To keep an open mind , that's all we are really asking you to do.

A. You're asking me to take an oath, and I can't take an oath.

T. 4559-60.

My feelings could affect the way that I answer the questions. My feelings could answer the way that I interpret the evidence, and I don't know what my feelings are going to be.

T. 4566.

... I can't give that oath. I can't give anybody that oath. I can't honestly say that. I could say that I could raise my hand and take the oath, but to get back there, I know that it would affect me.

T. 4568. Ms. McDonald was excused for cause.

Ibid.

SUMMARY OF ARGUMENT

I

In Davis v. Georgia, 429 U.S. 122 (1976), this Court reaffirmed the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968), and applied that doctrine to cases tried under Georgia's bifurcated, "guided discretion" capital sentencing system. There is nothing different about Texas' bifurcated, "guided discretion" capital sentencing scheme that should lead the Court to any different result in this case.

This Court has long required that in any criminal case, the jury must represent a fair cross-section of the community. Witherspoon applied this requirement to the sentencing jury in capital trials, in recognition of the obvious fact that jurors' views about capital punishment will inevitably influence their sentencing deliberations. The jury still exercises substantial discretion under today's "guided discretion" capital sentencing systems, and in so doing its capacity to reflect a full cross-section of community attitudes is critical.

This is especially so in Texas. As a matter of State law, the Texas Court of Criminal Appeals

has recognized that where the jury's answers to three sentencing questions control the sentence to be imposed by the judge, the jurors' attitudes toward capital punishment will have to affect their answers to those three questions. As a matter of federal constitutional law, this Court has held that the sentencing jury in Texas does not merely answer three narrow factual questions, but must be accorded broad discretion to consider a wide range of mitigating circumstances. And as a matter of common-sense reality, the prospective jurors in this case knew that their answers to the three questions controlled whether Randall Dale Adams would live or die -- indeed, they were expressly told by the prosecutor and the trial judge -- and recognized that their views about capital punishment would necessarily influence the exercise of their discretion at sentencing.

In this setting, the selection of a jury in a Texas capital case may not constitutionally be skewed in favor of a death sentence by denying the defendant a jury representing a fair cross-section of community attitudes. The States are forbidden from excluding broad categories of persons from jury service, and must establish

through particularized inquiry that constitutionally acceptable grounds for excluding a particular venire member exist in fact. Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979). Accordingly, prospective jurors may not be excused for cause in a capital case unless it is made "unmistakably clear" (Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21) that in exercising their sentencing discretion they would automatically refuse to impose the death penalty regardless of the facts.

II

The rule of Witherspoon was clearly violated in this case by the exclusion for cause of several prospective jurors. Some of these venire members actually favored capital punishment. Others, although expressing some misgivings about either the death penalty in general or their ability to impose it in a specific case, were not shown to be against capital punishment to the extent required for exclusion under Witherspoon. All were excluded merely because they could not swear that the prospect of the death penalty would not "affect" their deliberations, an oath required of them by Texas Penal Code Section 12.31(b).

Persons whose deliberations might be "affected" by the death penalty do not meet the Witherspoon test for exclusion from capital juries. It makes a mockery of Witherspoon to exclude prospective jurors who, although not even opposed to capital punishment, have the sensitivity to be "affected" in their deliberations by the unique penalty at stake. As to the other venire members excluded, it is obvious that persons with "conscientious or religious scruples" against the death penalty (Witherspoon v. Illinois, supra, 391 U.S. at 522) will be "affected" by that belief in their sentencing deliberations. But Witherspoon requires that such affectation amount to an unambiguous and unyielding refusal to vote for the death penalty regardless of the facts, and that simply was not shown in this case.

Witherspoon expressly prohibits the states from employing any broader test for exclusion than the test set forth in Witherspoon itself. 391 U.S. at 522 n.21. Yet that is precisely what Texas did in this case. Texas excluded from jury service the very sort of venire members whose exclusion is forbidden by Witherspoon. Accordingly, the sentence of death imposed upon Randall Dale Adams cannot stand.

ARGUMENT

I

THE DOCTRINE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), IS FULLY APPLICABLE TO THE BIFURCATED PROCEDURE EMPLOYED BY TEXAS IN CAPITAL CASES

In Davis v. Georgia, 429 U.S. 122 (1976), this Court explicitly reaffirmed the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968):

> Unless a venireman is "irrevocably committed before the trial has begun to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings" (391 U.S. at 522 n.21), he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

429 U.S. at 123.

Necessary to the holding in Davis was the conclusion, unchallenged by the dissenting opinion, that the Witherspoon doctrine applies to trials conducted under Georgia's bifurcated, "guided discretion" system of capital sentencing approved by the Court in Gregg v. Georgia, 428 U.S. 153 (1976). Thus, the question before the Court in the present case can only be whether there is anything different about Texas' version of bifurcated, "guided discretion" capital sentencing that should lead to a different result than the one reached so recently in Davis. We

submit that plainly there is not. Accordingly the Witherspoon doctrine is wholly applicable to the capital sentencing system of the State of Texas.

The premise of Witherspoon is of vital significance in any system designed to determine whether a capital defendant shall live or be put to death: the State may not, by sweeping from the jury all persons expressing "general objections to the death penalty or ... conscientious or religious scruples against its infliction" (391 U.S. at 522), produce a sentencing tribunal so unrepresentative of a cross-section of the community that it is "uncommonly willing to condemn a man to die," id. at 521. Such an unrepresentative sentencing body is nothing more than a "tribunal organized to return a verdict of death" (id. at 521-22), a "hanging jury" (id. at 523), a jury whose composition "stack[s] the deck" (ibid.) against a man on trial for his life.

It is no innovation of Witherspoon, but merely an application of a long-acknowledged command of Due Process and Equal Protection, as well as of the Sixth Amendment, that whenever a jury is employed to determine issues in any criminal case it must be a fair and impartial jury in the sense

of being fairly reflective of the community from which it is drawn. See Smith v. Texas, 311 U.S. 128, 130 (1940); Carter v. Jury Commission, 396 U.S. 320, 330 (1970). A major function of this requirement is to assure the "application of the common sense of the community to the facts," Ballew v. Georgia, 435 U.S. 223, 232 (1978) and to guarantee that the "common sense judgment of a jury" upon the issues, Duncan v. Louisiana, 391 U.S. 145, 156 (1968), is a judgment reflective of the whole community and not merely of one subgroup.[4/]

Witherspoon applied this settled constitutional requirement to the sentencing function of juries in capital cases because, in deciding whether to sentence a defendant to die, "a juror's general views about capital punishment play an inevitable role," 391 U.S. at 519. One of the

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4/ This Court's decision in Duncan, applying the strictures of the Sixth Amendment to the States, came only two weeks after Witherspoon. Although Witherspoon was technically decided solely under the Due Process Clause of the Fourteenth Amendment, it envisaged and indeed is thoroughly reflective of this Court's subsequent decisions demanding a truly representative jury as a requirement of the Sixth Amendment. See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975); Ballew v. Georgia, supra; Duren v. Missouri, 439 U.S. 357 (1979).

most important functions of the jury in a capital case tried under bifurcated, "guided discretion" procedures, no less than under their predecessors, is "'to maintain a link between contemporary values and the penal system.'" Gregg v. Georgia, supra, 428 U.S. at 181 (plurality opinion), quoting Witherspoon v. Illinois, supra, 391 U.S. at 519 n.15. See also Woodson v. North Carolina, 428 U.S. 280, 288 & n.13 (1976) (plurality opinion). By insuring selection of a jury that is truly representative of the community, Witherspoon forbids the breaking of this link, which in turn guarantees that the capital sentencing process will be genuinely reflective of "evolving standards of procedural fairness in a civilized society." Gardner v. Florida, 430 U.S. 349, 357 & n.7 (1977) (plurality opinion).[2/]

5/ See Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975):

> We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to

[footnote 5/ continues on next page]

Although the "guided discretion" models for capital sentencing approved by the Court in Gregg and companion cases delimit the broader discretion accorded an Illinois jury at the time

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5/ continued

> guard against the exercise of arbitrary power - to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge.... This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concepts of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case.... The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

of Witherspoon, the Court recognized in Gregg that under such models "some jury discretion still exists" (428 U.S. at 198)(plurality opinion), and that the jury is still permitted "to dispense mercy on the basis of factors too intangible to write into a statute." Id. at 222 (concurring opinion of Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist).6/ Similarly, the Court noted that in Florida the sentencing factors hardly have "numerical weights assigned to them," Proffitt v. Florida, 428 U.S. 242, 258 (1976)(plurality opinion), and that the statutory aggravating and mitigating circumstances of that State "are not susceptible of mechanical application," id. at 260 (concurring opinion of Mr. Justice White, joined by the Chief Justice and

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6/ Were the states constitutionally entitled to impose a sentence of death mandatorily upon all persons convicted of a given offense, it might be argued that the Constitution need not prevent those states that leave capital sentencing to the jury from "delegating the penalty decision to a group who will impose the death penalty more often than would a group differently chosen." Witherspoon v. Illinois, supra, 391 U.S. at 541 (dissenting opinion of Mr. Justice White). However, this Court has now held that mandatory death sentences are unconstitutional under the Eighth and Fourteenth Amendments. Woodson v. North Carolina, supra, 428 U.S. 280 (1976); Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976); Harry Roberts v. Louisiana, 431 U.S. 633 (1977).

Mr. Justice Rehnquist).[7] Accordingly, this Court's application of Witherspoon to "guided discretion" capital sentencing systems in Davis v. Georgia, supra, simply recognizes the obvious fact that under those systems a jury's capacity to reflect a full cross-section of community attitudes continues to play a critical role in determining whether "death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion).[8]

The same perception applies with full force to the capital sentencing scheme of the State of

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7/ Although the jury's role in sentencing in Florida capital cases is advisory, the trial judge may not overrule a jury recommendation of mercy unless "'the facts suggesting a sentence of death ... [are] so clear and convincing that virtually no reasonable person could differ.'" Proffitt v. Florida, supra, 428 U.S. at 249.

8/ As we shall demonstrate in Point II, infra, even the concerns voiced by the dissenting opinion in Davis are inapplicable to this case. Here, not one but several prospective jurors were excluded in violation of Witherspoon; the questioning of those venire members was not truncated but rather averages 40 transcript pages apiece; and the number of peremptory strikes left to the prosecutor at the conclusion of the jury selection was insufficient to strike all of the prospective jurors unconstitutionally removed for cause.

Texas. As a matter of State law, the Texas Court of Criminal Appeals has recognized that while the Texas statute requires the jury

> ... only to answer questions while the judge actually assesses the punishment based on such answers, the fact remains that the jury will know that their answers will determine whether the defendant is to be punished by death or by life imprisonment. To say that the jury's answers would not be affected by their attitude toward the death penalty as a punishment for crime simply because they will not bring forth the ultimate verdict would be to disregard the obvious. We will not engage in such tenuous reasoning.

Hovila v. State, 532 S.W.2d 293, 294 (Tex. Crim. App. 1975). Clearly, a jury aware that its answers to three special issues automatically dictate whether the judge will impose a life or a death sentence[9] cannot escape being influenced by its attitudes toward the death penalty. If those attitudes did not affect its performance of its sentencing tasks, then the practice of death-qualification itself would be an unnecessary and wholly unjustified depletion of the jury pool -- an invasion of the cross-sectional character of the jury for no purpose whatsoever, and hence patently unconstitutional.

9/ Tex. Code Crim. Pro. Art. 37.071(e).

Furthermore, the jury in a Texas capital case does much more than answer three narrow factual questions. Its deliberations upon those questions must be permitted to encompass "whatever evidence of mitigating circumstances the defense can bring before it." Jurek v. Texas, 428 U.S. 262, 273 (1976)(plurality opinion); id. at 272, 276. The jury "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Id. at 271. Were the inquiry at sentencing any less broad, the Texas statute would be invalid under this Court's determination in Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion), that the jury may not be precluded from considering in mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Thus, not only does Texas law recognize that the jury's function at the penalty phase involves far more than answering three simple questions of fact,[10/] but under the Eighth

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10/ Hovila v. State, supra; see also Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975).

and Fourteenth Amendments the jury's role must involve far more.

If this were not sufficiently obvious as a matter of state law and federal constitutional law, it is clearly illustrated by the jury selection process in this very case. The excluded venire members, told that they would have to answer such subjective questions as "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society,"[11/] did not fail to see that their answers would inevitably involve judgment, intuition, and hence attitude as much or more than the finding of some simple fact. See e.g., Mahon at T.70. ("I could be influenced and I think most anyone could be"); McDonald at T. 4529 ("I think anyone's feelings would [be affected]"); Jenson at T. 367-70 ("Well, I think it probably would [affect my deliberations] because afterall, you're talking about a man's life here. You definitely don't want to take it lightly." "... I'm just human like everybody else.... I think it probably will effect anybody's." "I

11/ Tex. Code Crim. Pro. Art. 37.071 (b)(2).

don't know of anybody it couldn't [affect]...." "I don't believe anybody could [not be affected] because you might as well get a computer to sit on the jury.").[12/]

Additionally, the prosecutor in this case explicitly informed the venire members that their answers to the three special issues would control the life-or-death sentence subsequently imposed by the judge. Thus, the prospective jurors knew that they would not merely be answering three questions "yes" or "no;" they would be deciding whether Randall Dale Adams lived or died. See Mahon, T. 54, 55, 60; Jenson, T. 357-58; Ferguson, T. 618; Coyle, T. 1029, 1035; White, T. 1533-34, 1535; Williams, T. 2589-90; Andrews, T. 2699; Giuffrida, T. 4454; Riddle, T. 4931; McDonald, T. 4524. In many instances, this stark reality was reiterated to the venire members by the trial

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12/ In the experience of amicus, such responses are by no means atypical. See, e.g., Hovila v. State, 562 S.W.2d 243, 246 (Tex. Crim. App. 1978), in which prospective juror Glass stated that particularly with regard to the "dangerousness" question, "judging something that would take the life of a man would have to affect" his deliberations.

the trial judge. See Mahon, T. 56; Coyle, T. 1032, 1033; White, T. 1540, 1541, 1543; Williams, T. 2594-95, 2596, 2597, 2598; Andrews, T. 2702; McDonald, T. 4543.

In this setting, Texas' selection of a jury to decide the question of life or death may not constitutionally be skewed in favor of death. It would be so skewed if Texas were permitted to excuse prospective jurors for cause without meeting Witherspoon's requirement that a venire member's unwillingness to impose the death sentence regardless of the facts must be made "unmistakably clear" before he or she may be excluded from the jury. Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21 (1968); Boulden v. Holman, 394 U.S. 478, 482 (1969); Maxwell v. Bishop, 398 U.S. 262, 265 (1970); Davis v. Georgia, supra, 429 U.S. at 123 (1976). That requirement, like the substantive standard of Witherspoon, is firmly grounded in this Court's decisions under the Sixth and Fourteenth Amendments. For it is settled that where an exclusionary practice dilutes the cross-sectional character of the jury, that practice must be fine-tuned to its justification; and

neither approximate rules of thumb nor broad exclusions without particularized inquiry are permitted. Taylor v. Louisiana, 419 U.S. 522, 534-35 (1975); Duren v. Missouri, 439 U.S. 357, 369-70 (1979). As the Court declared in Duren, "the constitutional guarantee to a jury drawn from a fair cross-section of the community requires that the States exercise proper caution in exempting broad categories of persons from jury service." Id. at 370.

Here, the only rationale or justification that Texas can conceivably offer for exclusion is a supposed "inability to follow the law and instructions of the trial judge," Lockett v. Ohio, supra, 438 U.S. at 597 (1978), because of the prospective juror's views regarding capital punishment. But that is the identical justification which was asserted for death-qualifying the jury in Witherspoon (391 U.S. at 518-19) -- a justification which the Court did not disallow as a matter of law (id. at 522-23 n.21) but did insist as a matter of fact must be made "unmistakably clear" (ibid.) and "unambiguously" stated by a prospective juror on voir dire examination

(id. at 516 n.9) before the asserted justification could constitutionally support an exclusion for cause. See also Boulden v. Holman, supra, 394 U.S. at 483-84. There is no reason why the same justification for the same exclusion should be subject to a different constitutional rule in Texas than in Illinois, when the purpose of the rule -- no less applicable here than there -- is to demand that the existence of the justification must be factually established with requisite clarity. Although each State may be entitled to exclude prospective jurors who cannot follow its law, neither is entitled to excuse any verire member for this reason unless the applicability of the reason to the particular venireman is established by an unambiguous showing "that that is his position" in fact, 391 U.S. at 516 n.9.

Texas, like Illinois, may require a jury that is "simply 'neutral' with respect to penalty." Id. at 520. But it has no more claim than Illinois to go further and to assert immunity from constitutional restraints when it has "crossed the line of neutrality," ibid. Yet that is precisely what Texas did in this case, as we shall next show.

II

THE RULE OF WITHERSPOON V. ILLINOIS WAS VIOLATED BY THE EXCLUSION FOR CAUSE OF SEVERAL PROSPECTIVE JURORS WHO, ALTHOUGH EITHER IN FAVOR OF CAPITAL PUNISHMENT OR NOT OPPOSED TO CAPITAL PUNISHMENT TO THE EXTENT REQUIRED FOR EXCLUSION UNDER WITHERSPOON, COULD NOT SWEAR THAT THE POSSIBLE IMPOSITION OF THE DEATH PENALTY IN THIS CASE WOULD NOT "AFFECT" THEIR DELIBERATIONS

At petitioner's trial, several venire members were excluded for cause in clear violation of Witherspoon standards. Some of these prospective jurors actually favored the death penalty. Others, although generally opposed to capital punishment, were not so fixed in their opposition as to justify their exclusion under Witherspoon. However, all of those excluded felt that in deciding questions which would determine petitioner's fate, they would necessarily be "affected" in their deliberations by the prospect of the death penalty. They were thereupon stricken pursuant to Section 12.31(b) of the Texas Penal Code, which requires the exclusion for cause of every prospective juror in a capital case who is unable to swear that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Persons whose deliberations might be "affected" by the prospect of the death penalty simply do not meet Witherspoon's constitutional test for exclusion for cause. That test prohibits the exclusion of prospective jurors who do not make it

> unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

391 U.S. at 522 n.21 (emphasis in original). As a panel of the Fifth Circuit recently recognized in Burns v. Estelle, 592 F.2d 1297, 1301 (5th Cir. 1979), rehearing en banc granted, 598 F.2d 1016 (5th Cir. 1979),[13/] the fact that a prospective juror might be "affected" by the prospect of the death penalty [Tex. Penal Code §12.31 (b)] is not a lawful ground for exclusion under this constitutional test because:

> [To be "affected"] spans the range of possible effects ... from a mere heightening of the seriousness with which [one] might approach her deliberations as a juror, through

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13/ Burns was argued before the Fifth Circuit en banc on January 8, 1980.

> conscientious and moral dilemmas foreseen, to an utter refusal to deliberate rationally at all. More than this [is] required for ... disqualification....

Burns v. Estelle, supra, 592 F.2d at 1301.

At least three prospective jurors in petitioner's case, Mrs. Francis Mahon, Mr. Forrest J. Jenson, and Mrs. Nelda Coyle, were not opposed to capital punishment and were perfectly capable of imposing it in this type of case. Mahon, T. 33-37, 49, 60-64; Jenson, T. 351, 354, 361-64; Coyle, T. 1023-26. They were nonetheless excluded for cause merely because they could not swear, as required by Tex. Penal Code §12.31 (b), that their deliberations would not be "affected" by the prospect of the death penalty. Mahon, T. 67-71; Jenson, T. 367-71; Coyle, T. 1030, 1035, 1038, 1048-55, 1064-65, 1067, 1070.

At no time did these three prospective jurors state, as required by Witherspoon, that they would automatically vote against capital punishment without regard to the facts, or that they could not render an impartial decision as to guilt or innocence. They simply said that in weighing petitioner's fate, the potentially lethal consequences of their deliberations would naturally enter into their thinking. As Mr. Jenson stated:

> Well, I think it probably would [affect my deliberations] because afterall, you're talking about a man's life here. You definitely don't want to take it lightly.

T. 367.

The ground upon which venire members Mahon, Jenson and Coyle were excluded for cause makes a mockery of Witherspoon. The Illinois practice declared unconstitutional in Witherspoon at least required some genuine opposition to capital punishment. But here, Texas has permitted the prosecution to exclude for cause all venire members having even the slightest qualms about the death penalty. Obviously, to strip the jury of all individuals who, although not opposed to capital punishment, have the discernment to be affected in their sentencing deliberations by the nature of the unique penalty at stake, produces "a jury uncommonly willing to condemn a man to die." Witherspoon v. Illinois, supra, 391 U.S. at 521.

Several other prospective jurors were also excluded in this case solely because they could not take the Section 12.31(b) oath. Although these venire members voiced some misgivings about either capital punishment in general or their ability to impose it in a specific case, none clearly stated that he or she would automatically

vote against the death penalty without regard to the facts. See e.g., Mrs. Lloyd White, T. 1525-66; Mr. Curtis Williams, T. 2571-2604; Mrs. Bobbie Andrews, T. 2692-2730; and Ms. Penny McDonald, T. 4492-4571.[14/] They were stricken not because their qualms about the death penalty were so unambiguously clear and unyielding as to meet the Witherspoon test for exclusion, but merely because they were human enough to be "affected" in their deliberations by the realization that life was at stake in the controversy.

It is difficult to imagine any thoughtful juror, faced with deciding whether a defendant will live or die, not being so affected. "[W]hat candid and responsible citizen would not admit as much, could truthfully swear the proposition to be one of no concern whatever?" Burns v. Estelle, supra, 527 F.2d at 1301. And surely any prospective juror having misgivings about capital punishment -- including the sort of "general objections to the death penalty or ... conscientious or religious scruples against its infliction" which are not constitutionally sufficient grounds for

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14/ The voir dire examination of these prospective jurors is set forth in detail at pp. 12-27, supra.

exclusion under Witherspoon, 391 U.S. at 522[15/] -- is virtually certain to be so affected.[16/] As Judge Roberts of the Texas Court of Criminal Appeals stated in his dissent in Shippy v. State, 556 S.W.2d 246, 262 (Tex. Crim. App. 1977):

> ...Witherspoon holds that a juror's exclusion cannot be predicated upon his general objection to the death penalty or his conscientious and religious scruples against its infliction. It is readily apparent that a person who generally objects to the death penalty because of conscientious and religious scruples against its infliction will

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15/ See also Boulden v. Holman, supra, 394 U.S. at 482-84 (1969); Maxwell v. Bishop, supra, 398 U.S. at 265 (1970).

16/ In most instances, the invocation of the §12.31(b) oath in this case was expressly aimed at the jurors' sentencing deliberations. See, e.g., Mahon, T. 70; Jenson, T. 367-69; White, T. 1544; Williams, T. 2598-99, 2603; McDonald, T. 4530, 4566. In other instances the prosecutor's questioning broadly applied the §12.31(b) oath to all deliberations, thereby necessarily encompassing deliberations at the penalty trial as well as those at the trial of guilt or innocence. And the Texas Court of Criminal Appeals has repeatedly construed the oath as applying to sentencing deliberations as well as to deliberations on guilt. See Burns v. State, 556 S.W.2d 270, 275-76

[footnote 16/ continues on next page]

> have his determination of fact affected by such belief. But if such "affectation" does not amount to an unambiguous and irrevocable commitment to vote against the death penalty in all cases, such individual cannot be constitutionally challenged for cause under Witherspoon.

A majority of the Texas Court of Criminal Appeals has repeatedly held that the Section 12.31(b) oath is constitutionally valid. See, e.g., Burns v. State, 556 S.W.2d 270, 276 (Tex. Crim. App. 1977); Anderson Hughes v. State, 562 S.W.2d 857, 860-61 (Tex. Crim. App. 1978). That

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16/ continued

(Tex. Crim. App. 1977) and cases cited therein; Anderson Hughes v. State, 562 S.W.2d 857, 860-61 (Tex. Crim. App. 1978); Bell v. State, 582 S.W.2d 800, 806 (Tex. Crim. App. 1979). Indeed, it so held in this very case. Adams v. State, 577 S.W.2d 717, 728 (Tex. Crim. App. 1979).

In any event, the §12.31(b) oath is invalid even if applied solely to deliberations at the trial of guilt or innocence. For to be "affected" in one's deliberations by no means renders it "unmistakably clear" that the juror is incapable of "making an impartial decision" as to guilt. Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21. As a panel of the Fifth Circuit noted in Burns v. Estelle, supra, 592 F.2d at 1301, such "affectation" could amount to no more than a determination to study the evidence with great care, to be thorough and meticulous, to display a "heightening of the seriousness with which [a juror] might approach her deliberations."

court believes that the oath may be viewed as a test separate and apart from Witherspoon, and that venire members who are clearly qualified under Witherspoon may nonetheless be disqualified under the oath. Anderson Hughes v. State, supra.[17/] But Witherspoon did not simply establish one form of test for qualifying or disqualifying death-scrupled veniremen in capital cases. It explicitly prohibited the States from employing any more extensive grounds than the Witherspoon test for excusing veniremen for cause on account of their attitudes toward the death penalty:

> If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out....

17/ See also Burks v. State, 583 S.W.2d 389, 393-94 (Tex. Crim. App. 1979); Bodde v. State, 568 S.W.2d 344, 348 (Tex. Crim. App. 1978); Chambers v. State, 568 S.W.2d 313, 319-20 (Tex. Crim. App. 1978); Billy George Hughes, Jr. v. State, 563 S.W.2d 581, 583 (Tex. Crim. App. 1978); Hovila v. State, supra, 562 S.W.2d 243, 248 (Tex. Crim. App. 1978); Burns v. State, supra, 556 S.W.2d 270, 275-76 (Tex. Crim. App. 1977); Moore v. State, 542 S.W.2d 664, 672 (Tex. Crim. App. 1976).

391 U.S. at 522 n.21.[18/]

Under this Court's decision in Davis v. Georgia, supra, 429 U.S. 122 (1976), the unconstitutional exclusion for cause of even a single prospective juror in a capital case requires reversal of the death sentence. See also Marion v. Beto, 434 F.2d 29 (5th Cir. 1970). As the Fifth Circuit stated in Marion:

18/ Respondent may argue that the prosecution's failure to use four of its peremptory challenges in this case renders the Witherspoon error harmless. However, this Court has long held that speculation as to what a prosecutor might possibly have done with his unused peremptory challenges is insufficient to overcome Witherspoon error. In Davis v. Georgia, supra, 429 U.S. 122 (1976), a majority of the Court rejected the dissent's contention (id. at 124) that the presence of an unused peremptory might render the Witherspoon error harmless. And in a plethora of cases prior to Davis, the Court similarly reversed state court decisions that had expressly relied upon unused peremptories to avoid the invalidation of death sentences under Witherspoon. See Whan v. Texas, 438 S.W.2d 918 (Tex. Crim. App. 1969) (14 unused peremptories), rev'd, 403 U.S. 946 (1971); Speck v. Illinois, 41 Ill. 2d 177, 242 N.E.2d 208 (1968) (79 unused peremptories), rev'd, 403 U.S. 946 (1971); Bernette v. Illinois and Tajra v. Illinois, 45 Ill. 2d 227, 258 N.E.2d 793 (1970) (33 unused peremptories), rev'd, 403 U.S. 947 (1971); Mathis v. New Jersey, 52 N.J. 238, 245 A.2d 20 (1968) (5 or 6 unused peremptories), rev'd, 403 U.S. 946 (1971); Wigglesworth v. Ohio, 18 Ohio St. 2d 171, 248 N.E.2d 607 (1969) (7 unused peremptories), rev'd, 403 U.S. 947 (1971).

[footnote 18/ continues on next page]

> The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society . . . . Given the weightiness of the subject involved it really does not follow that the improper exclusion of a relatively small number of the total veniremen examined does not prejudice the defendant's rights to an impartial cross-section of the community.

18/ continued

Obviously, there are many factors that go into a trial attorney's decision to use a peremptory strike. Among these are the number of strikes already used, the number remaining, the number of jurors yet to be chosen, an assessment of the likelihood of having to use several additional strikes on venire members yet to come (based upon prior investigation, scrutiny of questionnaires answered by the panel, personal observation, etc.), and the likelihood of the trial judge granting additional peremptories. It would be sheer conjecture to assume that a prosecutor will automatically exercise a peremptory challenge every single time the trial judge denies his request to exclude a venire member for cause. Surely, in a death case, such surmise is insufficient to render constitutional error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

In any event, the issue does not arise in this case. Use of the four peremptory challenges allegedly left to the prosecutor (Respondent's Brief in Opposition to Certiorari, p. 8) would have been insufficent to strike the numerous venire members who were excused for cause for failure to subscribe to the §12.31(b) oath even though not subject to exclusion under Witherspoon.

> Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a defendant.

Id. at 32.

In this case, not one but several venire members were unconstitutionally excluded. Indeed, the record is replete with disregard for this Court's decision in Witherspoon. As in Witherspoon, the jury selection process here "stacked the deck" (391 U.S. at 523) against Randall Dale Adams. Accordingly, the judgment below, insofar as it leaves undisturbed the sentence of death, must be reversed.19/

19/ Under Texas law, the State may not retry petitioner solely on the issue of punishment. See Ellison v. State, 432 S.W. 2d 955 (Tex. Crim. App. 1968); Grider v. State, 468 S.W.2d 393 (Tex. Crim. App. 1971); Ocker v. State, 477 S.W.2d 288, 291 (Tex. Crim. App. 1972). However, if the prosecutor is unable to retry the entire case, Texas law permits the Governor to simply commute the sentence to life imprisonment. See Whan v. State, 485 S.W.2d 275 (Tex. Crim. App. 1972); Stanley v. State, 490 S.W.2d 828, 830 (Tex. Crim. App. 1972).

[footnote 19/ continues on next page]

CONCLUSION

This Court should reverse the judgment of the Texas Court of Criminal Appeals in this case

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19/ continued

Although irrelevant to the decision of this case, it is perhaps worth noting that in our experience the §12.31(b) oath has not been invoked by all Texas prosecutors, and its invalidation by this Court will by no means result in reversal of all or even most of the 117 death sentences presently in force in Texas. To be sure, the oath is at least arguably at issue in approximately half of the 52 death cases affirmed by the Texas Court of Criminal Appeals to date. But Texas prosecutors have been on notice for several years that reliance upon the oath was fraught with danger [see, e.g., Shippy v. State, supra, 556 S.W.2d 246, 257-63 (Tex. Crim. App. 1977) (Roberts, J. dissenting); see also Crump, Capital Murder: The Issues in Texas, 14 Houston L. Rev. 531, 543 & n.69 (1977); Comment, Death Prone Jurors: The Disintegration of the Witherspoon Rule in Texas, 9 St. Mary's L. J. 288 (1977)], and even before that the district attorneys of some counties [e.g., Tarrant (Ft. Worth), Travis (Austin) and Collin (suburban Dallas)] had sought to avoid its use. We have seen many records that are free of §12.31(b) error.

insofar as it leaves the sentence of death undisturbed.

Respectfully submitted,

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